IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 444 OF 1998

1. Venkatesh @ Bhayya
Krishna Nadar,
resident of Room No.7,
Mother Teressa Chawl,
Thembipada, Anthony Colony,
Bhandup
Mumbai 400 078. (Ori. Acc. No. 3)

2. Silvaraj @ Das Sabestian
Vaniyan,
resident of Room No.3,
Marshal Dias Chawl,
Anthony Church Colony,
Thembipada,
Behind Sainath Temple,
Bhandup, (Ori. Ac. No.4)
Mumbai 400 078. ...Appellants.

Versus

The State of Maharashtra ...Respondent

WITH
CRIMINAL APPEAL NO. 494 OF 1998

1. Nikson Jerimiya Nadar,
resident of Room No.7,
Punjabi Patra Chawl,
Near Dutta Mandir Road,
Village Road, Bhandup,
Mumbai 400 078 (Ori. Acc. No.1)

2. Piramal Suppaya Nadar,
resident of Behind
Anthony Church,
Bhandup,
Mumbai 400 078 (Ori. Acc. No.2)
...Appellants.

Versus

The State of Maharashtra ...Respondent.

.....

Shri. S.N. Bhosale, Advocate appointed for the appellants in Criminal appeal No. 444/1998.

Shri. M.R. Deshpande, Advocate appointed for the appellants in Criminal appeal No. 494/1998.

Mrs. U.V. Kejriwal, A.P.P. for Respondent-State in both the appeals.

.....

CORAM: H.L. GOKHALE AND
SMT. V.K. TAHILRAMANI, J.

DATED: 21ST JULY, 2004

ORAL JUDGMENT (PER SMT. TAHILRAMANI, J.):-

1. Through Criminal appeal No.444 of 1998, the appellants therein i.e. original accused Nos. 3 Venkatesh @ Bhayya Krishna Nadar and original accused No.4 Silvaraj @ Das Sebastian Vaniyan, have challenged the judgment and order dated 18.2.1998 passed by the Additional Session Judge Greater Mumbai in Sessions Case No. 1066 of 1996. By the said judgment and order, the appellants have been convicted and sentenced to undergo R.I. for life for the offence U/sec. 302 r.w. 34 of I.P.C. They were also convicted for the offence U/sec. 452 r.w. 34 of I.P.C. and sentenced to suffer R.I. for three years and to pay fine amount of Rs.1,000/- i/d to suffer R.I. for six months.

. By the very same judgment and order, the learned

Sessions Judge also convicted the original accused No.1 Nikson Jerimiya Nadar and original accused No.2 Piramal Suppayya Nadar for the offence U/sec. 302 r.w. 34 of I.P.C and sentenced them to undergo R.I. for life. They were also convicted for the offence U/sec. 452 r.w. 34 of I.P.C. and sentenced to suffer R.I. for three years and to pay fine amount of Rs.1,000/- i/d to suffer R.I. for six months. These two accused persons preferred Criminal Appeal No. 494 of 1998 whereby they have challenged their conviction and sentence.

2. As the facts relating to both the appeals are the same and all accused are involved in the same offence, this common judgment is being delivered in both the appeals. For the sake of convenience, we shall refer to all the appellants as referred by the trial Court i.e. Nikson Nadar shall be referred to as accused No.1, Piramal Nadar shall be referred to as accused No.2, Venkatesh @ Bhayya Nadar shall be referred to as accused No.3 and Silvaraj @ Das Vaniyan shall be referred to as accused No.4. During the pendency of these appeals, original accused No.1 Nikson Jerimiya Nadar who is the appellant No.1 in Criminal appeal No. 494 of 1998, expired, hence, appeal in respect of him came to be abated by order dated 8.12.2003.

3. The prosecution case briefly stated is as under:-

. Deceased Jyotimani Ramaswami Nadar had a grocery shop i.e. Laxmi Kirana Stores. The said shop was situated at Tembhipada, Bhandup, Mumbai. The residence of Jyotimani was behind the shop. On 22.5.1996 at about 6.00 a.m. Jyotimani as usual was opening his shop at that time, four accused persons came there. Firstly accused No.2 Piramal assaulted Jyotimani. Thereafter Jyotimani went inside his shop where all four accused assaulted Jyotimani with deadly weapons.

. P.W.8 Nayanar Nadar was residing near the shop of deceased Jyotimani. One person by name Anna informed him that Jyotimani was assaulted, hence he went to the shop of Jyotimani. There, he saw that Jyotimani was lying in an injured condition. P.W.8 Nayanar asked Jyotimani as to who had assaulted him. In reply, Jyotimani told him that he was assaulted by accused No.2 Piramal, accused No.1 Nikson and two other persons. Immediately, P.W.8 Nayanar rushed to the police station. At the police station, he was directed to take the injured to Mulund General Hospital. Hence, P.W.8 Nayanar came to the shop of Jyotimani, where P.W.8 Nayanar found that Jyotimani was not there in the shop and

he was already taken to Mulund General Hospital by one rickshawala P.W.4 Dhanraj Nadar.

. P.W.4 Dhanraj was informed at about 6.00 a.m. that Jyotimani was assaulted near Laxmi Kirana Stores. Hence, he went there and found that Jyotimani was lying between the shop and his residence which were adjoining each other. He drove injured Jyotimani to the police station. There the police informed that he should take the injured to the hospital. Accordingly, he took Jyotimani in the Auto Rickshaw to the hospital. In the Auto Rickshaw Jyotimani told P.W.4 Dhanraj that accused No. 2 Piramal and accused No.1 Nikson and two other persons had assaulted him.

. P.W.11 Sharad Ovhal was the S.H.O. at Bhandup Police station at the relevant time. He has stated that at about 6.15 to 6.30 a.m. one auto rickshaw arrived at the police station. One person got down from that rickshaw and came to him and told that one injured person was there in the rickshaw who had been assaulted by someone by knife. That person gave his own name as Nadar. P.W.11 Ovhal directed that the injured person be taken to the Mulund General Hospital. Thereafter, he alongwith P.W.12 P.I. Shinge and other staff members immediately proceeded to Mulund General Hospital.

There they saw that injured person was being treated by the Doctor. They asked doctor whether the patient was in a fit condition to give his statement. Doctor answered in affirmative. Thereafter, the statement of injured Jyotimani came to be recorded. The said statement (Exh.24) has been treated as F.I.R.

4. Jyotimani expired on the same day sometime after the F.I.R. was recorded. The body came to be referred for post mortem. P.W.6 Dr. Kelvekar performed the post mortem. He found 17 external injuries on the body of Jyotimani, which briefly are as follows:-

i. Incised stab wound right side chest front oblique 6 cms x 7 cms. both angles acute. .

ii. Incised stab wound over abdomen on the midline 11 cms x 2 cms. with intestinal coils and mesentry coming out with 2 overlapping injuries both sides are been cut at 2 places. 6 and 7 cms. from upper angle suggestive of separate oblique stab injuries. Both angles acute.

iii. incised stab wound left side of abdomen 4 cms x 1 cms. oblique outer angle acute and inner angle obtuse.

iv. Incised wound over left side abdomen oblique 3 cms x 1 cms.

v. stitched wound over right upper arm 12 cms. long with 14 stitches.

vi. stitched wound over medial aspect right upper arm transversely placed 4.5 cms long with 4 stitches.

vii. Incised wound right buttock 5.5 cms x 1 cm. muscle deep with both angles acute.

viii. Incised chop wound on left parietal region of scalp 10 cms x 1 cm bone deep with skin flap.

ix. Incised wound over left temporal parietal region with location 4 x 1 cms bone deep with skin flap parietal bone cut.

x. Incised chop wound on right parietal

region 10 x 1 cm bone deep with parietal bone cut.

xi. Incised chop wound over right occipital junction 3 cms x 1 cm bone underneath cut.

xii. Incised chop wound over right occipital region 5 x 1-5 cms bone deep with skin flap.

xiii. Contused abrasion below top of shoulder on the right 10 x 3 cms. red in colour.

xiv. Contused abrasion over back of left side chest below angle of scapular bone 18 x 1.5 cms.

xv. Abrasion back of abdomen 3 x 2.5 cms.

xvi. incised stab wound right side back 6 x 1 cms. both angles acute.

xvii. Incised stab wound back of the abdomen left side oblique 4.5 cms x 1.5 cms. muscle deep.

5. After the F.I.R. was lodged, investigation was carried out in the usual manner. Statements of witnesses came to be recorded. After completion of investigation, the charge-sheet came to be filed.

6. In due course, the case came to be committed to the Court of Sessions. All the four accused came to be charged for the offence U/sec. 302 r.w. 34 of I.P.C. and for the offence U/sec. 201 r.w. 34 of I.P.C. All accused pleaded not guilty to the said charges and claimed to be tried. Their defence is that of total denial.

7. During the trial, in all prosecution has examined 13 witnesses. P.W.5 Vijaykumar Nadar and P.W.7 Dayal Nadar are the eye witnesses to the incident. P.W.4 Dhanraj Nadar and P.W.8 Nayanar Nadar are the witnesses to whom Jyotimani made an oral dying declaration. P.W.11 P.S.I. Ovhal has recorded the F.I.R./dying declaration (Exh.24) of Jyotimani. P.W.3 Ramchandra Kshatriya and P.W.9 Yogesh Pandya have turned hostile and their evidence is of no use to the prosecution. P.W.1 Dr. Smita Padwal treated Jyotimani in the casualty department. P.W.13 Dr. Lata Vasvani examined Jyotimani and gave her endorsement that he was in a fit condition to give his statement. P.W.6 Dr. Vijay Kelvekar performed the post mortem. P.W.10

Uday Kakkar is the panch witness who has deposed about the recovery of burnt pieces of Baniyan (article 5) at the instance of accused No.4 Silvaraj and P.W.12 P.I. Shinge is the investigating Officer in this case. After going through all the evidence, the learned Sessions Judge acquitted all the accused under section 201 r.w. 34 of I.P.C. However, the learned Sessions Judge convicted the appellants under section 302 r.w. 34 and 452 r.w. 34 of I.P.C. Hence, this appeal.

8. We have heard Mr. S.N. Bhosale for the appellants in Criminal Appeal No. 444 of 1998 preferred by the original accused Nos. 3 and 4 and Mr. M.R. Deshpande, the learned advocate for appellant Piramal Nadar in Criminal Appeal No. 494 of 1998. We have also heard Mrs. U.V. Kejriwal, the learned A.P.P. for the State in both these appeals and perused the entire evidence as well as the judgment and order of the learned Sessions Judge.

9. The evidence on which the conviction of original accused No.2 Piramal Nadar is founded is:-

i. Ocular account rendered by P.W.5 Vijaykumar Nadar and P.W.7 Dayal

Nadar.

ii. The evidence of P.W.4 Dhanraj Nadar and P.W.8 Nayanar Nadar to whom the deceased made oral dying declaration implicating the accused No.2 Piramal Nadar.

iii. F.I.R./dying declaration (Exh.24) made by deceased Jyotimani to P.W.11 P.S.I. Ovhal.

10. The evidence as far as the original accused Nos. 3 and 4 i.e. Venkatesh @ Bhayya Nadar and Silvaraj @ Das Vaniyan respectively, are concerned, is that of P.W.7 Dayal Nadar. In addition thereto, the prosecution has relied on the evidence relating to recovery of burnt pieces of blood stained baniyan (Article 5) at the instance of accused No.4 Silvaraj. Panch witness P.W.10 Uday Kakkar has deposed on this aspect.

11. Looking to the nature of injuries on the body of deceased Jyotimani, there is no doubt, that the death was homicidal. P.W.6 Dr. Kelvekar has stated that injury Nos. 1 to 3 each by itself was sufficient to cause the death of the person to whom it was inflicted; in the ordinary course of

nature. The cumulative effect of all the injuries together was necessarily fatal. Injuries 8 to 12 each by itself would have been sufficient in ordinary course of nature to cause the death of the person to whom it had been inflicted. The cause of death is given as haemorrhage and shock due to multiple incised stab wounds and chop wounds (un-natural). The injuries have been set out in para 4 of this judgment. Moreover, it is not the defence of the accused that the death was not a homicidal one. As per evidence of P.W.6 Dr. Kelvekar, the injuries are consistent with the weapons used in this case. The only question is whether the evidence connects the appellants with the death of Jyotimani.

12. We shall first take up the evidence relating to accused No.2 Piramal Nadar. We shall first deal with the ocular account rendered by the two eye witnesses i.e. P.W.5 Vijaykumar Nadar and P.W.7 Dayal Nadar. Vijaykumar Nadar has stated that on 22.5.1996 as usual at about 6.00 a.m. he went to deliver milk to Jyotimani at Laxmi Kirana Stores. When he reached Laxmi Kirana Stores, at that time, accused No.2 Piramal also came there. Accused No.2 Piramal started assaulting Jyotimani. On witnessing this, due to fear, this witness ran away. Nothing has been elicited in the cross

examination of this witness so as to disbelieve him. So also on behalf of the accused nothing has been brought on record that there was any previous enmity between this witness and the appellant Piramal for P.W.5 Vijaykumar to falsely implicate him. We find the evidence of Vijaykumar to be absolutely natural, convincing and trustworthy. Hence, we have no hesitation in relying on his evidence.

13. The other eye witness in the case is P.W.7 Dayal Nadar. Dayal Nadar has stated that on 22.5.1996 at about 6.00 a.m. he was going towards one Rajkumar Hotel. When he came near the shop of Jyotimani he saw that the shutter of the shop of Jyotimani was open. Dayal Nadar has stated that all the four accused persons came there. Accused No.2 Piramal gave a blow to Jyotimani by sickle. After receiving that blow, Jyotimani entered into his shop. All the four accused followed him and went inside. There accused No.3 Venkatesh and accused No.4 Silvaraj assaulted Jyotimani with knives and accused No.1 Nikson assaulted the deceased with wooden stick. Thereafter, this witness left the spot and went to his house. It is pertinent to note that though the incident has occurred on 22.5.1996 the statement of this witness came to be recorded almost two months later i.e.

on 17.7.1997. We find that no plausible explanation has been given by the prosecution for the delay in recording the statement of this witness. No doubt, the witness has tried to explain the delay by stating that he was frightened and hence, he did not disclose the incident to the police. However, from the evidence on record, we find that he did not disclose this incident to anybody i.e. not even to his close relatives and friends. We also find the conduct of this witness improbable specially in the light of his evidence wherein he has stated that when Jyotimani entered into his shop after he was first assaulted by Piramal and all the accused followed him, this witness also entered into the shop. If the witness had the courage to follow four assailants armed with deadly weapons into the shop, we find it improbable and unbelievable that thereafter he was frightened and hence he did not state anything to to anyone including the police for about two months. Thus, in this view of the matter, we find that no plausible explanation has been offered by the prosecution to explain the delay. In our view, this delay throws a dark cloud of doubt on the veracity of the evidence of this witness. In such case, we find it extremely risky to rely on the evidence of this witness. Moreover, in the present case it is pertinent to note that in his dying

declaration/F.I.R. (Exh.24) the deceased has specifically stated that Nikson and Piramal assaulted him. In his dying declaration Jyotimani does not speak of any other person assaulting him, except these two persons. In this view of the matter, we do not find it safe to rely on the evidence of P.W.7 Dayal Nadar.

14. In the present case, the deceased had made two oral dying declarations i.e. to P.W. 4 Dhanraj Nadar and P.W.8 Nayanar Nadar. As per the evidence of P.W.8 Nayanar Nadar after Jyotimani was assaulted, One Anna informed him that Jyotimani was assaulted, hence, Nayanar Nadar went to the shop of Jyotimani and saw that Jyotimani was having injuries on his body. On enquiry, Jyotimani informed this witness that he was assaulted by Piramal and Nikson and two more persons. Immediately thereafter, this witness rushed to the police station. At the police station, the police directed to take the injured to Mulund General Hospital, hence he came to the shop of Jyotimani to take Jyotimani to Hospital. However, there, he found that Jyotimani was already taken to the hospital at Mulund by another Rickshawala i.e. P.W.4 Dhanraj Nadar.

15. P.W.4 Dhanraj has stated that he knew

Jyotimani. On 22.5.96 at about 6.00 a.m. he was informed that the owner of Laxmi Kirana Stores had been assaulted, hence he went to the shop. There he saw that the shutter of the shop was open and Jyotimani was lying there in an injured condition. He drove Jyotimani in the auto rickshaw first to the police station. Thereafter, Jyotimani was taken by him to the Hospital. In the auto rickshaw Jyotimani told him that accused No.1 Nikson, accused No.2 Piramal and two other persons had assaulted him and as a result of which he sustained injuries. On going through the evidence of these witnesses i.e. P.W.4 Dhanraj Nadar and P.W.8 Nayanar Nadar, we find their evidence to be cogent, reliable and trustworthy. Nothing has been brought out in the cross examination of both these witnesses so as to discredit their testimony on the ground that Jyotimani made oral dying declarations to them that he was assaulted by accused No. 1 Nikson, accused No.2 Piramal and two other persons.

16. When P.W.4 Dhanraj Nadar took Jyotimani first to Bhandup police station. P.W.11 P.S.I. Ovhal was the S.H.O. at the police station. P.S.I. Ovhal has stated that on 22.5.1996 at about 6.15 to 6.30 a.m. one auto rickshaw arrived at the police station. One person got down from that rickshaw and came to him and told that one injured person

was there in rickshaw and the person had been assaulted by someone by knife. That person gave his own name as Nadar. P.W.11 Ovhal directed that the injured person be taken to the Mulund General Hospital. Thereafter, he alongwith P.W.12 P.I. Shinge and other staff immediately proceeded to Mulund General Hospital. There they saw that injured person was being treated by the Doctor. They asked the doctor whether the patient was in a fit condition to give his statement. The doctor answered in the affirmative. Thereafter, the statement of injured Jyotimani came to be recorded. The said statement (Exh.24) has been treated as an F.I.R. In the said statement/dying declaration (Exh.24) Jyotimani has stated that while he was opening his shop in the morning, two persons i.e. accused No.1 Nikson and accused No.2 Piramal whom he knew, came there and assaulted him by knives. After the assault he was brought by P.W.4 Dhanraj Nadar and admitted in Mulund General Hospital.

17. P.W.13 Dr. Lata Vasvani was attached to Mulund Hospital at the relevant time. She has stated that she gave an endorsement on Exh.24 that the patient was conscious and was in a position to give his statement. She has further stated that the statement (Exh.24) was recorded in her presence. In her cross examination also she has

reiterated that when the officer was asking the questions to the patient she was present. From the evidence of Doctor Vasvani, it is clear that Jyotimani was conscious and he was in a fit condition to give his statement when his dying declaration (Exh.24) came to be recorded.

18. Mr. Deshpande, the learned advocate for the accused No.2 Piramal has submitted that no dying declaration was made by Jyotimani and Exh.24 is false and concocted and cannot be relied upon. In support of this contention he has placed reliance on the evidence of P.W.1 Dr. Smita Padwal. In particular, he has placed reliance on the statement in the examination in chief of this witness, wherein she has stated that when injured was brought to the hospital, the injured was unconscious. On the basis of this statement made by P.W.1 Dr. Smita Padwal, it is contended that Jyotimani was unconscious and hence he could not have made the dying declaration. Reliance is also placed on the evidence of P.W.6 Dr. Kelvekar wherein he has stated that "15 minutes would be the maximum limit of the consciousness of the person sustaining injuries which were found on the body." In view of this statement, made by Dr. Kelvekar who had performed the post mortem on Jyotimani, it was contended that in such case even the oral dying

declarations which were made to P.W.4 Dhanraj and P.W.8 Nayanar could not have been made by Jyotimani. However, in this connection it would be pertinent to note that Dr. Kelvekar had not examined the deceased at any time when he was alive, whereas P.W.1 Dr. Smita Padwal and P.W.13 Dr. Lata Vasvani had an occasion to examine the patient Jyotimani while he was in Mulund General Hospital. No doubt P.W.1 Dr. Smita Padwal has stated that when Jyotimani was brought to the hospital he was unconscious. However, thereafter she has clearly stated that after primary treatment was given, the injured had regained consciousness. This witness has stated that after the injured was brought to the hospital, she gave him primary life sustaining treatment and referred him to the surgical ward. Thereafter, she has categorically stated that after primary treatment, the injured had regained consciousness. Thus, from the evidence of Dr. Padwal, it is clear that after primary treatment was given to Jyotimani, he regained consciousness. From the evidence of P.W.13 Dr. Lata Vasvani, it is clear that Jyotimani was conscious and was in a fit condition to give his statement when his dying declaration (Exh.24) came to be recorded. P.W.13 Dr. Lata Vasvani was the doctor who examined Jyotimani and gave an endorsement stating that the patient was

conscious and was in a position to give his statement. She has further stated that the statement of the patient was recorded in her presence. Thus from the evidence of P.W.13 Dr. Lata Vasvani, it is clear that Jyotimani was conscious and in a fit condition to give his dying declaration. We find no reason for this doctor to falsely implicate accused No.2 Piramal Nadar.

19. From the evidence of P.W.5 Vijaykumar Nadar, P.W.4 Dhanraj Nadar, P.W.8 Nayanar Nadar and P.W.11 P.S.I. Ovhal, it is seen that the evidence clearly points out to the complicity of accused No.2 Piramal in the offence of murder of Jyotimani.

20. In the present case, all the weapons i.e. sickle (Article 1), knives (Article Nos. 2 and 3) and stick article 4 were recovered at the instance of original accused No.1 Nikson. Dr. Kelvekar has stated that the injuries on Jyotimani are possible by these weapons. However, there is no recovery of any weapon at the instance of any other accused. Moreover, the panch relating to the said recovery has turned hostile. In any event as the recovery was not at the instance of accused Nos.2, 3 and 4, the same cannot be used against them.

21. As far as the accused No.3 Venkatesh and

accused No.4 Silvaraj are concerned we have already observed above that only one eye witness i.e. P.W.7 Dayal Nadar has implicated them. We have also observed earlier that we do not find it safe to rely on the testimony of this witness. The other eye witness does not implicate accused No. 3 Venkatesh and accused No.4 Silvaraj. So also, P.W.4 Dhanraj Nadar and P.W.8 Nayanar Nadar do not state that the deceased had named accused Nos. 3 and 4 as having assaulted Jyotimani. It is pertinent to note that the deceased himself in his dying declaration has named only two persons i.e. accused No.1 Nikson and accused No.2 Piramal as the persons who assaulted him. In his dying declaration (Exh.24) the deceased does not mention any other person. In view of this state of affairs, we find that there is no reliable material to connect the accused Nos. 3 and 4 with the incident.

22. Mrs. Kejriwal, the learned A.P.P. has submitted that there is recovery at the instance of accused No.4 Silvaraj. She has submitted that the clothes which were on the person of Silvaraj at the time of the incident were burnt and the same came to be recovered under panchanama (Exh.22). P.W.10 Uday Kakkar is the panch witness relating to the said recovery. No doubt, this witness has

supported the prosecution in respect of recovery of burnt pieces of clothes and ashes at the instance of accused No.4 Silvaraj. However, we find that the said recovery does not connect accused No.4 Silvaraj with the offence. This is so, as after the recovery, the burnt pieces of clothes (Article 5) were sent to the Chemical Analyser and the Chemical Analyser's report at Exh.32 clearly shows that no blood stains were found on the said pieces. In such case, the said recovery does not in any manner connect the accused No.3 Silvaraj with the offence. Thus, we are inclined to discard this piece of evidence. There is no other material which connects the accused No. 3 Venkatesh and accused No. 4 Silvaraj with the crime. In this view of the matter, we are inclined to acquit accused No.3 Venkatesh @ Bhayya Krishna Nadar and accused No.4 Silvaraj @ Das Sabestian Vaniyan for the offence U/sec. 302 r.w. 34 of I.P.C. and U/sec. 452 r.w. 34 of I.P.C.

23. As regards the conviction of the appellants i.e. original accused Nos. 2, 3 and 4 for the offence U/sec. 452 r.w. 34 of I.P.C. we find that no charge has been framed against any of the accused U/sec. 452 of I.P.C. On going through the charge, we find that the charge has been framed only U/sec. 302 r.w. 34 of I.P.C. and U/sec.

201 r.w. 34 of I.P.C. In fact the charge specifically states that the four accused in front of Laxmi Kirana Stores voluntarily struck Jyotimani with weapons with an intention to cause death of Jyotimani and death of Jyotimani was caused. Section 452 of I.P.C. reads as under:-

> 452. **House-trespass after preparation for hurt, assault or wrongful restraint,-** Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

. Section 442 of I.P.C. sets out what is house-Trespass. The said section reads as under:-

> 442. House trespass.- Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any

building used as a place for worship, or
as a place for the custody of property,
is said to commit "house-trespass".

24. Even though Section 452 of I.P.C. may not have been specifically mentioned in the charge, if the ingredients of the section had been set out in the charge, we would have upheld the conviction of accused No.2 Piramal under section 452 of I.P.C. However, on reading the charge we find that there is no mention in the charge that all the accused or any of the accused had entered into the shop of Jyotimani and thereafter, they assaulted him. Mrs. Kejriwal, the learned A.P.P. has contended that even if no charge has been framed under section 452 of I.P.C. the accused can still be convicted under the said section. In support of this contention she has placed reliance on the decision of the Supreme Court in the case of **K. Prem S. Rao & Anr. Vs. Yadla Srinivasa Rao & Ors. reported in (2003) 1 SCC 217.** In the said decision, it has been held that in case of omission or defect in framing the charge, the accused may still be convicted for offence actually committed and proved on basis of evidence on record, so long as accused has not been misled by any error or omission in framing the charge and no failure of justice has been occasioned. (Emphasis supplied by Court).

25. In the case of K. Prem S. Rao (Supra) the charge was framed U/sec. 304-B and 498-A of I.P.C. However, the accused came to be convicted U/sec. 306 and 498-A of I.P.C. The Supreme Court held that on the same facts and evidence on which the accused was charged U/sec. 498-A and 304-B the accused can be convicted and sentenced U/sec. 306 of I.P.C. It was further held that the accused had enough opportunity for his defence. The charge framed U/sec. 304-B and section 498-A of I.P.C. has been reproduced in the said judgment. On reading the said charge it is clear that though Section 306 was not specifically mentioned in the charge all the facts and ingredients of the offence U/sec. 306 of I.P.C. existed in the charge. In such circumstances, it was held that the mere omission on the part of the trial Judge to mention section 306 does not preclude the court from convicting the accused for the said offence when found proved.

26. However, in the present case on reading the charge at Exh.1, we find that it clearly states that the incident had occurred <u>in front of Laxmi Kirana Stores,</u> it does not mention anywhere that the accused had entered into the shop of Jyotimani and thereafter, they had assaulted him. The

accused in the present case were not put to sufficient notice of the offence for which they were convicted. As the accused were not aware of the charge, obviously they would not have cross examined the witnesses on that point. In other words, the accused did not have sufficient opportunity to defend themselves in respect of section 452 of I.P.C.. In the present case the accused persons have been clearly misled by the omission in framing the charge and it can clearly be said that it has occasioned in failure of justice in respect of their conviction U/sec. 452 r.w. 34 of I.P.C. In such case we are of the opinion that the conviction of the appellants U/sec. 452 r.w. 34 of I.P.C. deserves to be set aside.

27. We have already observed above that there is sufficient evidence to connect the accused No.2 Piramal with the offence of murder of Jyotimani. Thus, conviction and sentence of original accused No.2 Piramal Suppaya Nadar U/sec. 302 r.w. 34 of I.P.C. imposed by the learned Sessions Judge Greater Mumbai by the judgment and order dated 18.2.1998 in Sessions Case No. 1066 of 1996, is confirmed. However, the conviction and sentence U/sec. 452 r.w. 34 of I.P.C. is set aside.

28. The conviction and sentence of original accused No.3 Venkatesh @ Bhayya Krishna Nadar and original accused No.4 Silvaraj @ Das Sabestian Vaniyan U/sec. 302 r.w. 34 of I.P.C. and U/sec. 452 r.w. 34 of I.P.C. is set aside.

29. Accused No.2 Piramal Suppaya Nadar is in jail, he shall serve out his sentence.

30. Accused Nos. 3 Venkatesh @ Bhayya Krishna Nadar and accused No.4 Silvaraj @ Das Sabestian Vaniyan are on bail. Their bail bonds stand cancelled. The fine amount, if any, paid by accused Nos. 3 and 4, shall stand refunded.

31. Criminal appeal No. 444 of 1998 is allowed and Criminal Appeal No. 494 of 1998 is partly allowed.